United States
Circuit Court of Appeals
For the Ninth Circuit

No. 6535

In the Matter of RENFRO-WADENSTEIN, a Corporation, and RENFRO-WADENSTEIN FURNITURE COMPANY, a Corporation, Bankrupts.

WALTER S. OSBORN, as Trustee in Bankruptcy for RENFRO-WADENSTEIN, a Corporation, and RENFRO-WADENSTEIN FURNITURE COMPANY, a Corporation, Bankrupts,

Appellant,

vs.

KETCHAM & ROTHSCHILD, INC., a Corporation, and ROBERT W. IRWIN COMPANY, a Corporation,

Appellees.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Brief of Appellant Trustee

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LIST OF ABBREVIATIONS

E. — Trustee's Assignment of Errors.

Exh. — Exhibit.

Par. — Paragraph.

Tr. — Transcript of Record.

W. D.— Wadenstein's Deposition, Exh. 55.

STATEMENT OF THE CASE

These proceedings were initiated by separate petitions of Ketcham & Rothschild, a corporation, and Irwin & Co., a corporation, respectively, to reclaim (a) certain furniture alleged to have been under consignment with bankrupt; (b) Accounts Receivable from the sale of such furniture by bankrupt; and (c) cash proceeds arising from sales of furniture by bankrupt. The petitions were consolidated for trial.

Renfro-Wadenstein, bankrupt, was a retail concern dealing in furniture in Seattle, with a large store in the downtown business district. Petitioners were manufacturers of high grade furniture. For approximately five years prior to execution of the instant contracts, petitioners had been selling furniture to bankrupt on open account. Bankrupt retailed furniture of other manufacturers as well.

Bankrupt was in arrears with petitioners on its open account in 1927 and the early part of 1928. Bankrupt owed Irwin & Co. approximately $20,000, of which approximately $8,000 was for goods shipped during the year 1927 and the balance was for goods shipped prior to 1927. Bankrupt owed Ketcham & Rothschild approximately $17,000. Ketcham & Rothschild had a "frozen credit" arrangement with bankrupt whereby bankrupt was allowed credit on furniture of Ketcham & Rothschild's make to the value of $15,000 and was to maintain payment to date on all furniture above that valuation on

hand. Bankrupt paid an interest charge of 7% under the frozen credit arrangement.

In March, 1928, bankrupt sent an order for merchandise to Irwin & Co. Shipment was refused, Irwin & Co. declining to ship unless further payments were made on the account. Irwin and Rothschild held two conferences in March, 1928, concerning the Renfro account. Rothschild then came to Seattle. He was here four days. As the result of his trip the contracts, captioned "Consignment," were entered into between bankrupt and petitioners. (Tr. 112-117: 144-148; Exh. 1—Exh. 26 W. D.) Except for dates and names of parties the agreements are identical in terminology.

Renfro-Wadenstein signed each agreement under date of March 23, 1928. The Ketcham & Rothschild contract was delivered on that date to Rothschild in Seattle. Rothschild took the agreement with him to Chicago where J. W. Rothschild signed the same for Ketcham & Rothschild, inserting date on which the signature was affixed, March 30, 1928.

Two copies of the Irwin agreement were mailed to Irwin & Co. from Seattle. Irwin signed the agreement on behalf of his company, filling in the date April 1, 1928, but retained the original and copy until September 5, 1928, when he mailed a copy to the bankrupt.

Renfro-Wadenstein made an assignment for the benefit of creditors October 3, 1928. Petition was filed in bankruptcy on October 19, 1928. Adjudication was made

November 9, 1928. W. S. Osborn was elected as trustee, and qualified November 21, 1928.

On March 23, 1928, when Renfro-Wadenstein signed the so-called consignment agreements, there was furniture of each petitioner's *make* on the floor of Renfro-Wadenstein. As to this furniture, no issue is involved on the Trustee's appeal, since the Referee's holding that this furniture could not be reclaimed by petitioners was affirmed by the District Court. The same holding was made, and affirmed, concerning accounts receivable and cash proceeds from the sales of any furniture, whether shipped prior or subsequent to the execution of the so-called consignment contracts.

The only issue on this appeal is the effect of the *so-called consignment agreements on merchandise shipped by petitioners to bankrupt subsequently to March 30, 1928.*

The Referee decided that the contracts constituted sales, not consignments; and "that the circumstances outside the contracts required that they be given the legal effect of sales." The District Court modified the Referee's order only as to furniture shipped subsequently to March 30, 1928, holding that the agreements constituted contracts of consignment.

Shipments were made by Ketcham & Rothschild on April 2 and 7, 1928; by Irwin & Co. in April, May, July and August, 1928. Of these shipments there came into the hands of the trustee in bankruptcy merchandise of

Irwin's manufacture invoiced at $10,348.50 and merchandise of Ketcham & Rothschild's manufacture invoiced at $4,232.56.

The assets of the bankrupt were sold by the trustee, including furniture of petitioners' manufacture on bankrupt's floor, under stipulation between petitioners and trustee that a certain sum, aggregating 70% of the estimated value of the merchandise, accounts receivable and cash claimed by petitioners, would be set aside pending the outcome of this controversy. The order of the District Court awarded a money judgment against the trustee for 70% of the invoiced value of the furniture shipped by petitioners subsequently to March, 1928, or $7,243.95 to Irwin & Co.; $2,962.79 to Ketcham & Rothschild. The District Court also awarded petitioners a 3% interest charge on the above sums from April 12, 1929, to May 1, 1931, together with a carrying charge of 7% for a period beginning 90 days after shipment of furniture and ending on the date of the filing of the petition in bankruptcy, such carrying charge to be on the invoice value of the furniture shipped, and to constitute a *general claim* against bankrupt's estate. No costs were allowed.

SPECIFICATION OF ERRORS

The District Court erred in its order (Tr. 239-242) in the following particulars:

1. In deciding that the contract dated March 30, 1928, signed by Ketcham & Rothschild and Renfro-Wadenstein is a contract of consignment. (E. 1, Tr. 268.)

2. In holding that the contract between Irwin & Co. and bankrupt captioned "Consignment contract" is a contract of consignment. (E. 2, Tr. 268.)

3. In deciding that any furniture of petitioner Ketcham & Rothschild's make was held under consignment arrangement with the bankrupt. (E. 3, Tr. 268.)

4. In holding that any furniture of petitioner Irwin & Co.'s make was held by the bankrupt under a consignment arrangement. (E. 4, Tr. 268.)

5. In holding that no actual fraud was shown against petitioners within the state insolvency law or at all. (E. 9, 10, Tr. 269.)

6. In awarding judgment against the trustee on account of any furniture held by the bankrupt and shipped by petitioners or either of them to the bankrupt. (E. 5, Tr. 268.)

7. In awarding petitioners or either of them interest on the award made in paragraph I of the court's order. (E. 6, Tr. 269.)

8. In allowing petitioners or either of them a 7% carrying charge or any carrying charge. (E. 7, Tr. 269.)

9. In failing to allow to the trustee his costs taxable herein. (E. 8, Tr. 269.)

The above specifications of error are made without prejudice to the right of the trustee to assert additional assignments of error pertinent to the petitioners' cross appeal.

BRIEF OF ARGUMENT

I. The written contracts are *by their terms* sales, not consignments.

(a) The merchandise was "charged *provisionally* to consigned account."

(b) "Consignee shall pay all *freight* and *carrying charges* immediately upon arrival" of merchandise; and *all expenses of caring for the merchandise,* and insurance.

(c) Accounts receivable from sales of merchandise were property of Renfro-Wadenstein.

(d) The "consignee" incurred a present obligation, on demand of "consignor," to pay for the merchandise.

(e) Right to recall the merchandise during term of contract was not reserved by manufacturer.

(f) Dealer had no right to return the merchandise and receive credit therefor.

II.

The parties did not *operate* under the contract as consignor and consignee.

(a) Shipments by bills of lading were direct to debtors.

(b) The invoice price remained the same.

(c) The furniture was not invoiced on consignment.

(d) The interest rate remained the same.

(e) Renfro-Wadenstein exercised complete dominion over the merchandise.

(1) Dealer fixed the retail price.

(2) "Consigned" furniture was intermingled with other furniture on dealer's floor.

(3) Advertising furnished by manufacturer indicated ownership of furniture in Renfro-Wadenstein.

(4) Dealer sold "consigned" furniture on same bills with other furniture.

(f) Renfro-Wadenstein exercised complete dominion over the accounts receivable and proceeds from sale.

(g) Regular reports of sales were not made or required.

(h) Notes were accepted by Irwin & Co. in payment, and are still retained.

III.

The "consignment contracts" were devices to conceal a sale and were in fraud of creditors.

(a) Renfro-Wadenstein was insolvent and its insolvency was known to petitioners.

(b) Dominant idea with petitioners was to enforce payment by dealer.

IV.

The Irwin Contract is not a basis for reclamation.

(a) Contract was not completed until September 5, 1928.

(b) Contract is not retro-active and all merchandise was shipped before September 5, 1928.

(c) Contract was consummated within four months of bankruptcy.

ARGUMENT

I. The Written Contracts Are *by Their Terms* Sales, Not Consignments.

Introduction

It is the *inherent character* of the contract, not the designation or label which the parties apply to it, which determines whether a consignment exists.

"It is less difficult to arrive at a proper construction by determining the *benefits accruing and the burdens borne by the parties.*" *Reliance Shoe Co. v. Manly,* 25 Fed. 2nd 381, 383.

"This contract should be construed rather by *its express possibilities as to what the vendor may do and claim under it* than by its double aspect under which it may be a sale or not at the pleasure of the vendor." *Bradley-Alderson Co. v. M'Affee,* 149 Fed. 254, 260.

Agency is essential to the relationship of consignor and consignee.

"The essence of the agency to sell is the delivery of the goods to the person who is to sell them, *not as his own property, but as the property of the principal, who remains the owner of the goods, and who therefore has the*

right to control the sale, to recall the goods and to demand and receive their proceeds when sold, less the agent's commission, *but who has no right to a price for them before sale or unless sold by the agent." Meachem on Sales,* Sec. 43, Vol. 1, Pps. 40, 41.

"When the factor sells the goods to a third party, *the title is transferred from the original owner, directly to the third party, and at no point in the transaction does it vest in the factor or commission merchant. * * * The consignee holds them as bailee. If they are sold, the consignee holds the proceeds in the same manner.* The consignor has not merely a debt due him for the price, but he has a claim to the very fund which constitutes the proceeds of the sale. He owns the fund, and if the consignee withholds it or uses it, he is guilty of a conversion." *Mariash on Sales,* P. 8, *et seqq,* Par. 9, 1930 Ed.

(a) The merchandise was "charged *provisionally* to the consigned account." (Tr. 144; Exh. 1, Par. 1; Exh. 26 W. D., Par. 1.) "Provisional" is defined as "temporary, for the time being." *Anderson, Law Dictionary.*

"A provisional remedy is one which is provided for present needs, or for the occasion; that is, one adapted to meet a particular exigency * * *." *Davenport vs. Thompson,* (Iowa, 1928) 221 N. W. 347, 350.

"The word excludes the idea of permanency." 50 C. J. 833.

"Provisionally" has a two-fold significance in connection with these contracts. The first will be apparent when Paragraph 10 of the contracts is considered. The second phase will appear when the circumstances surrounding the execution of the contract, and the operations thereunder are considered. In any event, the word "provisionally" indicates a special contract to meet an exigency and man-

ifests that this was not an ordinary form of consignment.

(b) "Consignee" was required to "pay all freight and carrying charge immediately upon arrival" of the merchandise, to keep the merchandise insured and to pay the expenses of caring for the merchandise including insurance. (Tr. 144, Par. 2.)

(c) Accounts receivable from the sales of merchandise were property of Renfro-Wadenstein.

"In case party of the second part, due to its not having from its customers, payments for goods sold, shall not be able to make payment in cash (ie: to manufacturer), it shall give the party of the first part a demand note *collateraled by the assignment of accounts receivable at least equal to the amount of payments due for merchandise sold.*" (Tr. 145, Par. 5.)

One must have title to make an assignment as collateral. It necessarily follows that Renfro-Wadenstein owned the accounts receivable. This is inconsistent with consignment. See Meacham "Sales"; Mariash "Sales," *supra and* II (f) *infra.*

(d) The "consignee" incurred a present obligation to pay the invoice value of the merchandise upon demand by "consignor."

"This contract shall continue in force and effect *until terminated by one or both of the parties hereto* by written notice given to the other, *but in case of such termination, party of the first part shall have the right, at its option, to require party of the second part to keep and pay for the consigned goods then remaining on hand at the invoice price thereof* * * *." (Tr. 147; Par. 10, Exhs. 1 and 26.

This is one of the most significant paragraphs in the contract. The decision of the District Court on the consignment feature is based fundamentally upon the conclusion of the court that

"No present liability by the bankrupt was made, or right created to petitioner. * * * *The superadded agreement as to purchase was a condition which had not matured * * * The contingency not having matured into a fixed status,* the merchandise shipped on consignment and delivered to the trustee should be accounted for by him." (Tr. 237.)

The District Court relied entirely upon *In re Aronson* (D. C. Mass.) 245 Fed. 207 and *Mitchell Wagon Co. v. Poole* (C. C. A. 6th) 235 Fed. 817 to sustain the above propositions. We respectfully submit that neither case sustains the District Court's conclusion.

In the *Mitchell Wagon* case, dealer was bound to purchase and pay for the wagons, either (a) when he sold the wagons; or (b) within twelve months from date of the contract at *his (consignee's)* option; or (c) at the expiration of the selling period of twelve months; or (d) if *consignee* sold or closed out his business during term of the contract.

The court stated:

"The relation between them was that of principal and agent and not of seller and buyer. This follows from the fact that there was no agreement on the part of the bankrupt to pay the prices fixed for wagons—*it was not contemplated that he should pay for them except upon his becoming a purchaser in one of the contingencies named*

—and that the appellant had the right to demand a return of the wagons at any time."

"A *contingency* has the element of uncertainty and doubt, and is defined as an *event* which is possible, but which may or may not occur, in the nature of *casualty, accident or change, and results from an agency, the operation of which is uncertain.*" (Pope, Vol. 1, *Legal Definitions.*")

It will be observed in the *Mitchell Wagon* case and in cases there cited that the *contingency* upon which the transformation from a contract of consignment to a sale depends is either objective in its nature, that is to say, is a fixed and definite objective circumstance beyond control of either party to the contract, or is in effect not a contingency, but a matter of *option* on the part of the *consignee.* In no case has an agreement been held a consignment where it was the *right* of the *consignor to compel payment by consignee for the merchandise upon consignor's demand.* The practical difference is readily apparent. In cases such as the *Mitchell Wagon* case the consignor gains no advantage over the consignee or his creditors, because the event which makes the contract one of sale is either external and objective, or is determined by the consignee. In the present case, however, manufacturers had all the advantages of a sale by the mere formal act of declaring a termination of the contract under Paragraph X and thereupon demanding payment from dealer, and had also, under the District Court's ruling, all the advantages of a consignment so long as the contract remained in force. If consignee terminated the contract,

consignor could nevertheless require payment for the merchandise. In effect, therefore, the *consignor,* under the terms of the contract, dictated the basis for payment. If the optimism of Renfro-Wadenstein proved well founded the manufacturer could compel payment. If, on the other hand, as proved the case, the optimism was ill founded, then under the District Court's ruling manufacturer could reclaim and repossess the merchandise. The Bankruptcy Act aimed to eliminate as far as possible the expedient but unjust practice of the race going to the swiftest. Its principles should accord with equity. Consignments constitute a special class of contracts which need not be recorded under the laws of the state of Washington and which are therefore subject to grave abuse, being secret agreements in many cases without even constructive notice to other creditors of a dealer. To permit in addition a clause such as paragraph ten whereby a consignor, so-called, gains the advantages of consignment and of sale, extends the scope of consignments unduly. It will encourage in practice the growth of mushroom concerns with consigned furniture on their floors and with private agreements whereby if they prosper they pay for the merchandise and if they fail the merchandise is reclaimed at the expense of other creditors who have extended credit without being able to determine the dealer's actual condition.

In this case the obligation of the dealer was not contingent. No *event* need transpire. So far as Renfro-Wadenstein's obligations were concerned, the situation

would have been no different if Renfro-Wadenstein had given its promissory note to manufacturer covering the invoice value of the furniture. The manufacturer might in either instance defer the due dates. That does not argue that there was no obligation created. *Either* party may terminate the consignment contract *at any time.* When terminated by *either* party, "consignor" "shall have the *right, at its option* to require party of the second part to keep and pay for the consigned goods then remaining on hand at the invoice price thereof * * *." To say that by such terms "no present liability by the bankrupt was made, or right created to the petitioners," seems a total disregard of the *effect* of the terms. Petitioners had the *right* to compel payment when they chose.

In addition to the *Mitchell Wagon Company* case, *supra,* the District Court's conclusion on this phase is premised upon *in re Aronson,* (D. C. Mass.) 245 Fed. 207. We have studied that case carefully and we fail to see in what manner it supports the District Court's conclusion. In fact the *Aronson* case is most favorable to the trustee's position.

"Whether an arrangement is a consignment, a conditional sale, or a sale on credit, depends less on how it is described than on the rights and liabilities created by it. * * * To have agreed to buy goods, to take possession of them, to have the right to sell them at such price as one may fix, and the right to use the proceeds as one pleases *is to own the goods. Ownership is acquired on delivery of goods under such an understanding*, and it is not negatived by an agreement that, until they shall be sold by the vendee, the title to them shall remain in the vendor.

Such an agreement is inconsistent with the arrangement as a whole. *It is a misuse of language to say that the title is retained;* the facts show that it is not. 'Contracts of sale, under which title is to remain in the vendor, although the vendee may consume the goods, or sell them and apply the proceeds to his own use, are fraudulent as to creditors, because the stipulation that the title is to remain in the vendor is entirely inconsistent with the purpose of the contract.' *Ludvigh v. American Woolen Co.,* 188 Fed. 30, 33; 110 C. C. A. 180, 183; Id. 231 U. S. 522; 34 Sup. Ct. 161; 58 Law. Ed. 345." *In re Aronson,* 245 Fed. page 209.

In re Aronson cites only the *Ludvigh* case, *supra,* and *Flanders Motor Car Co. v. Reed,* 220 Fed. 642 (C. C. A. 1st). In the latter case a clause reserving title until the machines and parts were paid for in cash "did not go far enough, as against indications to the contrary, to establish a bona-fide understanding between the parties that the goods should, for all purposes, be the petitioners until the bankrupt had fully paid for them." (Page 644. See pages 643, 644.)

The court therein (p. 644) distinguishes the *Ludvigh* case, *supra,* holding the *Flanders* case was determined by *In re Garcewich,* 115 Fed. 87, (C. C. A. 2nd), which case confirms the Trustee's position herein.

The *Mitchell Wagon Company* case further distinguishes all cases cited by petitioners except the *Galt, Stoughton Wagon Co., Harris & Bacherig* cases and *In re Reynolds.*

Mitchell Wagon Co. v. Poole, 235 Fed. at page 822. The court admits that

"There is no decision of this court that can be said to be exactly in point." (Page 823.)

Considering the cases cited, the contract in *Harris & Bacherig,* (Tenn. D. C.) 214 Fed. 482, 483, stated

"If *either* party shall *fail or refuse* to perform any part of this contract, the other party shall have the right thereupon to terminate the same; and upon the termination thereof the consignors shall be entitled immediately to take possession of all goods on hand unsold. The consignor has the right to decide whether they want to take back the merchandise not paid for at that time or whether the consignee should pay for the merchandise at once * * *."

Under that contract, if one party defaulted, the *other party* had the right to terminate the contract. The consignor could not terminate the contract except upon default by the consignee. *Thus it was within the power of the consignee to prevent accrual of the right in consignor to compel a purchase,* and that simply by performing the contract. But in the instant case consignor can terminate the contract at will and can by the same token compel payment at will.

In *Franklin v. Stoughton Wagon Co.,* (C. C. A. 8th) 168 Fed. 857, the contract was entered December 28, 1907. Stoughton Wagon Co. was in bankruptcy before the twelve month period of the contract had expired. The contract provided that *"at the end of the twelve months,* said second party agrees if required by said party of the first part, to purchase at prices given in schedule or orders attached, all goods on hand unsold and not previously

settled for * * *." The question as to whether this constituted a sale was not discussed in the opinion, nor is there any indication that it was considered. In any event the expiration of the twelve months period was an objective condition which had not matured.

In the *Galt case,* 120 Fed. 64 (C. C. A. 7th), the court stated:

"The clause in the contract giving an option to the company to require Galt to give his note, or to pay in cash or to store, subject to the order of the company, the goods not sold within twelve months, *is probably the strongest clause in the contract to indicate a sale,* but as suggested by the Supreme Court of Illinois in *Lenz v. Harrison, supra, while it might have such force considered alone,* taking it with the whole contract it was seemingly incorporated to compel the agents promptly to sell, and report sales within the time stated." (Page 69.)

The wagons were ordered by consignee from consignor at the time the contract was executed. Consignee was not compelled under the contract to accept more wagons during the term of the contract. Thus consignee could save the necessity of purchase of the wagons by diligence in making sales as agent. In any event twelve months, a definite objective period of time, had to expire before the liability was incurred.

In re Reynolds, (D. C. Ky.) 203 Fed. 162, imposed no obligation upon the consignee to purchase the goods unless either (a) there were goods on hand *at the end of twelve months;* or (b) *agent* died; or (c) *agent* disposed of his business; or (d) *agent* desired to terminate the con-

tract. If the manufacturer terminated the contract, the goods were to be returned, *manufacturer to pay freight.* It was held that the petitioners had no right to the proceeds of goods sold by dealer.

The above authorities are the only foundation for the District Court's decision on this point. A recent construction has been placed upon the *Mitchell Wagon Company* case, *(In re Eichengreen,* (D. C. Md.), 18 Fed. 2nd 101), wherein the court, after stating the contingencies in the *Mitchell* case, asserted:

"The court held that, under the circumstances of that case, the relationship of the parties was that of bailor and bailee until one of these events took place, *since, otherwise, there was no agreement of the consignee to pay for the merchandise.* The decision was rested mainly upon the right given in the agreement to the consignor to require a restoration of the merchandise, *and upon the absence of an unqualified promise of the consignee to pay the purchase price for the thing alleged to be sold.* It is suggested that, if the receiver of the goods obligates himself to pay a fixed price at a fixed time, and there is no right on the part of the sender to a return of the goods, the contract is one of sale and not a bailment." (P. 105.)

There is an unqualified promise in the instant contract on the part of Renfro-Wadenstein to pay for the merchandise. The question of return of the merchandise will be considered *infra.*

Judge Bean's succinct decision in the case of *In re Roellich,* (D. C. Ore.) 223 Fed. 687, covers this question squarely, and fully sustains the trustee's position.

McKenzie v. Roper Wholesale Grocery, 70 S. E. 981, states:

"The test seems to be this: If the person to whom the possession of the property is delivered gets it by virtue of a contract of purchase (ie: gets it under such circumstances *that the person parting with possession can sue for the purchase price, irrespective of whether the person to whom the possession is delivered has sold or otherwise disposed of the goods),* the contract is one of conditional sale, notwithstanding it may impose limitations upon the purchaser's right to dispose of the property and may require a definite plan of accounting."

See also:

Sinnett v. Watkins Co., 282 S. W. 769, 770, 771.
Bradford and Co., Inc. v. U. S. Tent & Awning Co., 198 Ill. App. 505.

The essential question under the District Court's decision on the consignment feature is whether a present obligation was imposed upon the dealer and a present right vested in the manufacturer by paragraph X. That a right was created and an obligation imposed is illustrated in principle in *Green vs. Tidball,* 26 Wash. 338, 342; 55 L. R. A. 879; 67 Pac. 84, where the Court stated:

"The principal question is, was this right that the City had to levy an assessment upon the property to pay the costs of the improvement made in the street an incumbrance on the property within the meaning of that term as used in the deed? The appellants contend that it was not, because it had not attached at that time; that it was then but an *inchoate right, which might or might not thereafter become fixed and absolute, depending upon the action of the City;* and our attention is called to the City charter, which provides that an assessment for a public

improvement becomes a lien upon the property assessed 'from the time the assessment roll for such improvement shall be placed in the hands of the City Treasurer for collection' * * * The benefit conferred upon the land which gave rise to the right to make the levy, and without which no right to levy could arise, has been conferred. True, all of the steps necessary to protect the charge had not been taken, and the amount thereof being dependent on various considerations was undetermined, *and the City might or might not thereafter enforce the right.* In this *the right may be said to have been inchoate; but it was nevertheless a right which the City could enforce against the will and consent of the owner, and in spite of any objection he might make. As such it was a burden on the land depreciative of its value* * * *." (Pages 342, 343.)

In *Buffum vs. Descher,* 96 N. W. 352, there was a purported consignment agreement. The Court stated:

"If the goods were delivered to the consignee under such circumstances as to confer upon him absolute dominion over them and *he becomes bound to pay a stipulated price for them at a certain time, or upon the happening of any future event, the transaction amounts to a sale at delivery, and the title passes to him."*

On petition to recover proceeds of sale, the Court stated: *(In re Lenforth,* Fed. Cases 8369)

"At the end of the year they ('Consignees') were bound to pay, if required, for all goods remaining on hand. It is plain that this transaction in no respect resembles a consignment by a principal to a factor of goods to be sold on commission. It is a consignment of goods to be paid for at prices agreed upon and which bore no relation to the prices at which the consignees might sell or the amounts that they might be able to collect."

Further, suppose that the furniture had been seriously damaged by some element other than fire or water (against which the merchandise was insured). If the relation was that of principal and factor, the principal would have to bear the loss, *Sturm vs. Boker,* 37 Law Ed. 1093, 150 U. S. 312, 14 Sup. Ct. 99, but under the instant contracts, the manufacturers, on the happening of such event, could have given notice to dealer of termination of the contract and could have required payment for the furniture according to the invoice price thereof. (See 63 A. L. R. 373 N.) It is significant in this connection that such reservation of title as is made in the contract is not contained in a separate paragraph, but is an integral part of Paragraph X providing as follows:

"The consigned goods or the accounts representing the same and the proceeds thereof shall continue to belong to and be the property of said party of the first part until remittance therefor shall have been made to and received by said party of the first part *as herein provided.*"

"As herein provided" simply means until such time as "consignor" chooses to demand payment for the merchandise. If the furniture becomes obsolete, as furniture of that grade naturally would, or if it is damaged, or otherwise rendered valueless for sale purposes, the dealer can be made to pay therefor at the invoice price. This is wholly inconsistent with the relationship of principal and factor. See

Bradley, Alderson & Co. v. McAfee, infra (f); (D. C. Mo.) 149 Fed. 254.

Maxwell Motor Corp. v. Bankers Mort. Co., 192 N. W. 19, 20.

Arbuckle v. Kirkpatrick, 39 S. W. 3.

Thus Paragraph X imposed upon the dealer all the *obligations of a sale* and vested in the manufacturer the rights *incident to a sale.* It is the practical effect of the instruments to which the Court looks. Paragraph X does not hinge upon a *contingency* but vests in manufacturer an absolute right which he may exercise when he desires.

(e) The contracts do not reserve in the manufacturer the right to recall the specific merchandise during the term of the contract but permit the dealer to return "another thing of value."

"The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the *specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed; the transaction is a sale." Sturm vs. Boker,* 37 Law Ed., p. 1100; 150 U. S., p. 329.

Reservation in the consignor of the right to compel the return of the specific thing sent, is a *necessary element* in a bailment; such right was not reserved in this case, however, except upon termination of the contract, and upon termination of the contract the consignor could dictate whether consignee should pay the invoice price or return the merchandise. The paragraphs relative to returning

the specific merchandise are Paragraphs VIII and X, Tr. 146, 147. Paragraph VIII does not give a *right of repossession or recall,* the only *right* of recall granted by the specific terms of the contract being under Paragraph X and arising only in case of termination of the contract. This matter is stated concisely by the Referee in his memorandum decision. (Tr. 204-206.)

Petitioners have not contended that a specific right to repossess the goods at any time was expressly granted by the terms of the contract, but rely upon the contention that Paragraph VIII, "pre-supposes the right to recall at any time, and where such a right is at any time pre-supposed it is in legal effect granted."

Petitioners insist that the words "at any time" in Paragraph VIII pre-supposed such right. However, under Paragraph X, manufacturer had the right *at any time* to terminate the contract and *thereupon* to require return of the furniture, if it chose. Paragraphs VIII and X are therefore consistent with Trustee's contention, and with each other. These contracts were drafted by petitioners and are therefore to be construed most strongly against petitioners. This is the more apparent when the operations under the contracts are considered *infra II.* See

> *Yarm v. Lieberman,* 46 F. (2d) 464, 466 (D. C. N. Y.)

"Since one who speaks or writes can, by exactness of expression more easily prevent mistakes in meaning than one with whom he is dealing, doubts arising from ambiguity of language are resolved in favor of the latter * * *."

Williston, "Contracts," Vol. II, Sec. 621, pp. 1203, 1204, citing authorities in Note 9, including *In re Eighth Ave.,* 82 Wash. 398, 144 Pac. 533, which states page 402:

"Parol evidence is seldom permitted to contradict a written contract. When the contradiction appears in the written evidence itself, the matter should be resolved most strongly against the party at whose instance the words were used."

In support of their contention petitioners cited the cases of *Mitchell Wagon Co. vs. Poole, Supra, In re Smith & Nixon Piano Company, infra; In re King & Franklin vs. Stoughton Wagon Co., infra.*

In the *Mitchell Wagon* case, *Supra,* the right of repossession was pre-supposed from the provision that the bankrupt should be entitled to freight and drayage paid out by him, if appellant should order the wagons reshipped or turned over to other parties when bankrupt had complied with the terms of the contract, but reimbursement was not to be made if appellant concluded it wanted possession because of any violation by bankrupt of the contract. (Page 821.)

The instant contract does not provide for reimbursement to dealer for freight, drayage, crating or any other item. If petitioners' contention is correct, the definite obligation has been placed upon dealer to "crate and place on cars at any time," without any correlative right in dealer. Positive and definite language was needed to impose such obligation.

In re Smith & Nixon Piano Co., (C. C. A. 8th) 149 Fed. 111, does not contain a discussion of this point. In that case "there was no present or fixed obligation to pay *either then or in the future* * * *." (Page 112.)

This Court, *In re King,* 262 Fed. 318, 321 (C. C. A. 9th) considered an *oral contract,* whereby a company was to keep King "supplied with a small stock of tires 'consignment for sale,' for which he would make a settlement every month by payment of an amount *twenty per cent less than the list price of the tires sold,* with a further five per cent off of said list price for a settlement of account within thirty days." Invoices bore terms, "consigned accounts."

A representative of the company went to King's shop every month and checked over the stock. King never placed orders for goods. At the end of the month, an accounting was had, and a separate account then made covering goods sold. Payments were regular. This Court stated (page 321):

"The fact that there was no express agreement that the title to the property delivered by the Empire Company to King should remain in the former, therefore the return by King of such portion of it as remained unsold by him to the consignor, does not show, nor, indeed, tend to show, that the transaction between the parties was anything more than the ordinary one of the consignment of personal property for sale, *unattended, as it was, by any positive acts of the consignor, that can be properly held to have enabled the consignee to commit any fraud upon the public.*"

Franklin v. Stoughton Wagon Co., 168 Fed. 857 (C. C. A. 8th), contains a clause which is unequivocal: "The second party hereby agrees to forward any goods received on its contract, at any time, *and as said Stoughton Wagon Company or their authorized agents may direct,* charging only actual freight and drayage and a reasonable transfer charge, *collecting same from transportation company as back charges.*" (Page 860.) A similar provision is contained *In re Taylor,* 46 F. (2d) 326, 329. See page 328 for definition of "consignment."

It is significant that consignment contracts which reserve the right to compel return of the goods provide for reimbursement to consignee of the expense of reshipment. Such is a natural incident of an agency contract. If consignor is to impose an obligation on consignee to pay freight upon return of the merchandise, the right of recall should be definite and unambiguous. In this case the reservation of title to the goods, to the accounts and to the proceeds was for the evident purpose of enabling the manufacturer to preserve the right created under Paragraph X of the contract. This being so, a right of recall during the life of the contract cannot be presupposed any more than such right could be presumed if no reservation of title were contained in the contract. See *In re Zephyr Mercantile Co.,* (D. C. Tex.), 203 Fed. 576, 579, 580.

(f) Dealer had no right to return the merchandise and receive credit therefor.

If dealer had shown an inclination to return the obsolescent furniture, manufacturer could have terminated the contract and demanded payment *instanter.* Nor is there any express provision in the contract permitting the dealer to return the merchandise and receive credit therefor. In *Reliance Shoe Co. vs. Manly,* 25 Fed. 2nd 381 (C. C. A. 4th), the Court stated (page 383):

"It will be seen that the bankrupt had no right to return the merchandise shipped for any cause and be discharged from liability, except where the shoes failed reasonably to conform to sample or were not the sizes ordered."

The opinion in *Bradley, Alderson & Co. v. McAfee* (D. C. Mo.), 149 Fed. 254, at page 259, reads in part as follows:

"We searched this contract in vain for any provision which enabled this so-called factor at any time or under any circumstances or condition, to return the goods, *except at the option of Bradley, Alderson & Co.* * *

at a specified date, Ward was compellable by Bradley, Alderson & Co. to pay for the goods at a designated cash price; he had no alternative left him of choice; *it was wholly at the election of Bradley, Aledrson & Co.* If so demanded by Bradley, Alderson & Co., when the time arrived, just as in the case of any other purchaser of goods, Ward was compellable to pay the stipulated price, whether or not he had sold a single article. This payment made, he would become the absolute owner. I respectfully, but earnestly, submit that if such a contract can pass as a consignment made to a factor, all that any vendor has to do to evade and render valueless the declared public policy of the state, to compel the placing of conditional sales, or delivery contracts, on record, is

to send his wares to a country merchant to be displayed in his store as his own, and sell to whom he may select, to be paid for to the sender at a future time, at a given price, at his option, provided only that the sender call the transaction *inter nos* a consignment or commission, or himself principal and the sendee his agent. If when the time of payment arrives, the shipper wants his money, he elects to have the sendee pay the cash provided he then be solvent; but if the sendee become insolvent and bankrupt, the sendor then leaves himself in position to exercise his other option to demand and reclaim the goods. If such cunning jugglery as this can get around or through the Missouri statute, then it is but a cobweb through which the cunning of the vendor with the subservient assistance of his vendee may break at will."

Such is likewise the effect of the instant contracts whereby the manufacturer may at any time compel payment for the merchandise. The statute of the State of Washington relative to conditional sales contracts is to the same substantial effect as the Missouri statute above referred to, and reads as follows (Remington Compiled Statutes, 3790; Remington & Ballinger's Code, 3670):

"That all conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to all bona fide purchasers, pledgees, mortgagees, incumbrancers and subsequent creditors, whether or not such creditors have or claim a lien upon such property, unless within ten days after the taking of possession by the vendee, a memorandum of such sale stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county wherein at the date of the vendee's taking possession of the property, the vendee resides."

See also:

In re Martin Vernon Music Co., 132 Fed. 983, 985 (D. C. Mo.);

Peoria Mfg. Co. v. Lyons, 153 Ill. 427, 38 N. E. 661.

We submit that the written contracts by their terms imposed upon dealer obligations incident to a sale and vested in manufacturer rights consistent only with a sale. Merchandise was charged provisionally to consigned accounts; consignee paid full freight and carrying charges and all expenses of caring for merchandise; accounts receivable were property of dealer; a present obligation was incurred by dealer to pay invoice price of the merchandise at any time manufacturer demanded payment; right of recall of merchandise was not reserved in manufacturer except in connection with termination of contract and the right incident thereto of manufacturer to compel payment for the merchandise; and dealer had no right to return the merchandise and receive credit therefor. The contracts were framed by petitioners; the burden is upon petitioners to establish as against the trustee that the contracts are consignments; ambiguities are to be resolved against petitioners; the practical effect of the written contract is a sale.

II.

THE PARTIES DID NOT OPERATE UNDER THE CONTRACTS AS CONSIGNOR AND CONSIGNEE.

"Whether the transaction was a bailment or a sale, will not be determined solely by the words employed in the written instrument. Its meaning being doubtful, the Court will look also to the acts and circumstances of the parties, *especially to the construction which they themselves put upon the contract in executing it.* The real characteristics of a sale or *their legal effects* are not changed by calling it a bailment. The Court will look to the purpose of the contract rather than to the name given it. * * *" *Samson Tire & Rubber Co. v. Eggleston,* 45 Fed. 2nd 502, 504 (C. C. A. 5th).

Ketcham & Rothschild and Renfro-Wadenstein had been operating under a "frozen credit" arrangement, prior to the execution of the so-called consignment contracts. Ketcham & Rothschild would extend Renfro-Wadenstein "a credit for merchandise" which would *remain as indebtedness* from Renfro-Wadenstein to Ketcham & Rothschild up to $15,000.00 that Renfro-Wadenstein would use towards having samples to that value on their floor. Any merchandise that they bought in excess of that sum, or that was not to be on their floor, they would pay in their usual terms, 2 per cent, 30 days, net 60 days, 30 extra." (Tr. 29.) This arrangement was operative in 1927 and to the date of the execution of the so-called consignment contract. (Tr. 29.) A comparison of the operations under that arrangement and

those under the consignment contract so-called shows that the parties treated the latter contract as a sale, not a consignment.

(a) The shipments by bills of lading were always directly to Renfro-Wadenstein. There was no change in this respect after the execution of the consignment contract. (Tr. 17, 34, 53.)

(b) The so-called consignment agreement made no difference in the invoice price which debtor was required to pay Ketcham & Rothschild and Irwin & Co. (Tr. 53.)

(c) The furniture was not invoiced as on consignment. The invoices both of Irwin and of Ketcham & Rothschild bore the designation, "Terms special." (Exhibits 55, 56 attached to W. D.; Exhibit 3.) This same designation had been used under the frozen credit arrangement. (Tr. 49, 50.) The printed form of invoice of Ketcham & Rothschild in 1927 contained the words "Terms 2%—30 days, or net 60 days." (Tr. 30.) Yet there was *typed* on the forms "Terms special." (Exhibits B—4 parts.) Entire secrecy was employed in connection with these invoices. (Tr. 30, 31).

The use of the words "Terms special" simply meant that the maturity was deferred and that debtor was given delayed dating. (Tr. 27, 28, Exhibit A.)

(d) The interest rate remained the same.

The interest rate under the frozen credit arrangement was 7 per cent (Exhibit A; Tr. 28). The "carrying

charge" is 7 per cent in the consignment contract. (Tr. 146, par. 6; see also Tr. 53.)

(e) Renfro-Wadenstein exercised dominion over the merchandise.

(1) Dealer fixed the retail price.

The contracts provided only that retail sales should be made "at prices not less than the net invoice price." (Par. 2, Tr. 145.) Dealer realized nothing from the sale unless it obtained more than the invoice price and dealer was in any event liable for the invoice price when the sale was made at retail. In addition, dealer had freight, carriage charges, interest and overhead to meet. Obviously a limitation that sales could not be made at less than the net invoice price meant little or nothing on such high grade furniture as that of petitioners' manufacture, and under the above circumstances. This Court has considered the effect of such an arrangement in *Miller Rubber Co. et al. v. Citizens Trust & Savings Bank, in re Newerf's Estate* (C. C. C. 9th), 233 Fed. 488, wherein the transaction was held to be a sale.

"We find the confirmation of this view in the failure of the consignors to fix by the contract *the prices at which the agent could sell the goods to its customers.* * * *."

Mitchell Wagon Co. v. Poole, 235 Fed 817, strongly relied upon by petitioners, states in part:

"But if the consignee is at liberty according to the contract between him and his consignor to sell at any price he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price, and at a

fixed time, in my opinion whatever the parties may think their relation is, it is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers *is not a contract made on account of his principal, for he is to pay a price which may be different from those fixed by the contract. * * * He is to undertake to pay a certain fixed price for those goods at a certain fixed time to his principal, wholly independent of what the contract may be which he makes with the person to whom he sells;* and my opinion is that in point of law the alleged agent makes, on his own account, a contract of purchase with his alleged principal, and is again reselling." (Quoting from *Ex parte White,* L. R. 6 Chan. App. 397, p. 821.)

Permitting the consignee to retail at any price the consignee may deem fit is an indication of sale. *In re Penny and Anderson,* 176 Fed. 141; *Taylor v. Fram,* 252 Fed. 465; *In re Sachs* (C. C. A. 4), 30 Fed. (2nd) 510, 512.

In re Leflys (C. C. A. 7th), 229 Fed. 695, concerned an agreement, allegedly a consignment, amongst other provisions of which was one to the effect that the retail price should be not less than the invoice price. The agreement was held not to be a consignment. The Court quoted from *Chickering v. Bastress* (Ill.), 22 N. E. 542, as follows:

"The provision (of the contract) authorizing the company to determine solely for themselves at what price they would sell the pianos from their store, is *almost conclusive* that in reality they were not acting as agents for factory of the Chickering, but that without further provision they were to bear as their proper burden all the expenses of shipping, etc. It seems there is no doubt that

the contract was not one of bailment or of principal and factor." (P. 698.)

The same principle is asserted *In re Rabenau* (D. C. Mo.), 118 Fed. 471, 475; *Weston et al. v. Brown et al.,* 53 N. E. 36, 38; *In re Agnew,* 178 Fed. 478, 481 (D. C. Miss.).

The elements essential to a consignment contract were carefully considered in *High Grade Electrical Store* (Cal.), 3 Amer. Bankruptcy Reports (N. S.), 78. *The Court referred to the lack of an agreement as to what penalty, if any, might be enforced by the petitioner in event of bankrupt's failure to maintain retail prices above the minimum set in the contract.* (Pp. 79.)

The District Court in Illinois *In re U. S. Electrical Supply Co.,* 2 Fed. 2nd 378, stated:

"The contract does not fix the price which the United States Electrical Supply Company was to receive for the wire, *and the evidence shows that no attempt was ever made by the Rome Wire Company to regulate such prices.* The courts hold that this is an element of the contract to be taken into consideration in determining whether it is bailment. The reason is that if the contract is a bailment *the proceeds belong to the consignor, and the consignor is interested in seeing that the goods are sold at the proper prices.*"

Irwin testified: "We did not at any time instruct the dealer as to the price at which they should sell the merchandise." (Tr. 16.)

Wadenstein: "Outside of the consignment contract, we never had any correspondence with the claimants, or

either of them, afterwards in the handling of the matter in which they told us what prices we were to charge." (Tr. 57.) Also, Rothschild, Tr. 25.

Furthermore, at any time during the period of the contract, dealer could pay the invoice price to manufacturer.

2. The furniture was intermingled with other furniture on the floor and had no distinguishing marks to give notice to the public that it was consignor's furniture.

There is nothing in the contract which requires that the merchandise be kept separate and apart from other merchandise on the floor of dealer. Petitioners were aware that the furniture would have to be intermingled with other merchandise on dealer's floor. (Tr. 17, 33, 34.) Aside from small pasters or metal tags there was nothing on the furniture to indicate that it belonged to petitioners nor was there anything on the tag which indicated that the furniture was delivered to the dealer other than on a direct sale. (Tr. 17, 34, 52.)

The language used by this Court in *Miller Rubber Co. v. Citizens Trust & Savings Bank*, 233 Fed. 488 (C. C. A. 9th), is particularly appropriate:

"Not only was the agent permitted to mingle the consigned goods with his own stock, but the contract expressly provided that consignors would furnish the consignee 'free of charge all samples of tires and accessories and necessary advertising matter, imprinted with the name and address of the consignee.' It is difficult to see how the consignors could have more effectually held the

consignee out to its customers as the real owner of the consigned property; to permit them to retake from the stock of the bankrupt the remaining portion of the consigned goods would in our opinion operate as a fraud on the creditors of the bankrupt."

We shall see under the next heading that advertising was furnished Renfro-Wadenstein. In the *Miller Rubber Company case,* Newerf was a sole agent; the tires were to be furnished "on consignment"; were to remain the property of consignor. Monthly reports were required together with monthly statements for all purchases. Yet, reclamation was denied.

3. Advertising was furnished by manufacturers and distributed by dealer, giving indication to the public that the merchandise was dealer's.

Wadenstein: "These two firms, or one of them, sent us literature from time to time advertising their furniture; this was for distribution by our firm and it did not give notice or advertise in any way that this furniture did not belong to Renfro-Wadenstein." (Tr. 57, 58; Exhibits 23, 25, 33, 35.)

See *Miller Lumber Co. v. Citizens Trust & Savings Bank supra.*

4. The furniture was sold by dealer on the same bill with other furniture. (Tr. 53, 54.)

Furthermore, "the dealer could sell on conditional sales contract." (Rothschild, Tr. 33.)

In *Buffum v. Descher*, 96 N. W. 352, there was a purported consignment agreement under which payment was

to be made contingent upon a sale by the so-called consignee. The Court stated:

"If the goods are delivered to the consignee under such circumstances as to confer upon him *absolute dominion* over them, and he becomes bound to pay a stipulated price for them at a certain time, or upon the happening of any future event, the transaction amounts to a sale at delivery, and the title passes to him."

See also:

Flanders Motor Co. v. Reed (C. C. A. 1st), 220 Fed. 642, 644; Mariash, "Sales" *supra;*

In re Penny & Anderson (D. C. So. Dist. N. Y), 176 Fed. 141;

Pontiac Body Co. v. Skinner (D. C. N. D., 158 Fed. 858, 861;

In re Taylor, 46 F (2d) 326, 328.

(f) Dealer exercised complete dominion over accounts receivable and proceeds. (Tr. 17.)

Irwin: "After the dealer sold the merchandise we made no effort to find out what it did with the money." (Tr. 17.)

Wadenstein: "*There was no difference in the matter of assigning the accounts after the consignment agreement than there was before.* (See Tr. 51, 60, 61.)

Rothschild was less frank on the matter of assignments. He acknowledged that he knew the dealer was assigning accounts to discount companies in March, 1928. (Tr. 27, 31.) Rothschild denied any knowledge that accounts receivable representing the "consigned merchandise" had been pledged or hypothecated or assigned by dealer.

However, in reply to a letter under date of August 24, 1928, from Renfro-Wadenstein to Ketcham & Rothschild, in which Renfro-Wadenstein apologized for not being able to enclose a check, stating that "collections and business during the summer months, as you undoubtedly know, are difficult"; dealer wrote: "possibly you do not realize that under our method of carrying accounts we have to carry a substantial reserve on these and altogether we have quite a little money tied up in accounts receivable." (Exhibit 35, Tr. 32.) Rothschild stated in his letter of August 28 to dealer (Exhibit 36):

"We notice particularly the last paragraph of your letter, *and would have you understand that we are thoroughly acquainted with how you are carrying your accounts, which makes it all the more difficult for us to understand why we should not receive our money promptly when due* * * *." (Tr. 32.)

An incident to a valid consignment contract is that the proceeds of sale of consigned goods shall be kept separate and apart from the proceeds from sales of other goods of consignee.

"My attention has not been called to any case where the consignee was permitted to mingle the proceeds of the sale of the consigned goods with the consignee's own money, and to use these proceeds in the usual course of his business, where it has been held that such a contract constitutes a bailment, and is valid as against the rights and interests of an execution creditor or a trustee in bankruptcy.

"A contract of this nature is valid as between the parties as a conditional sales contract but is constructively

fraudulent as against the trustee in bankruptcy, who stands in the position of an execution creditor.

"My conclusion is that the contract between the parties in this case was not a bailment, but was a sale with reservation of title in the seller until the purchase price was paid, and that such reservation of title is not valid as against the trustee in bankruptcy in this case." *In re United States Electrical Supply Co.* (D. C. Ill)., 2 Fed. 2nd 378, 383.

The opinion in that case cites and quotes many authorities to the same effect. (Pages 380 *et seqq.*)

"* * * All the essential elements of a contract of agency must unite before the goods can be successfully reclaimed by the seller; * * * if there be promissory notes or accounts in payment of the goods, such notes and accounts must be either forwarded to the seller or accounted for by the purchaser and held by him subject to the orders of the seller to be forwarded to him upon demand. All of these elements must unite to make such a contract of consignment as that the goods will be returned to the seller in reclamation proceedings."

In re Agnew (D. C. Miss.), 178 Fed. 478.

Fairbanks Co. v. Graves, 90 Miss. 453, 43 Sou. 675,

held that:

"The trust is lost, because of the co-mingling of the proceeds of the sale witih the assets, and possession of the notes, accounts and cash representing such sale were not demanded or taken possession of by the petitioner or anything done by him to procure such assets."

Taylor v. Fram (C. C. A. 2nd), 252 Fed. 465, is especially apt:

"If the bankrupt had given defendants a mortgage upon the stock in the store and had been permitted to sell the stock covered by it and to deposit the money received in its general account and use it to meet his liabilities as if no mortgage existed, instead of paying it over to the mortgagee, we should be obliged to hold that the mortgage was fraudulent as against the trustee in bankruptcy. (Citing authorities.) If that be so as to a mortgage of record, and of which creditors have constructive notice, it should follow *a fortiori* that an agreement of which creditors have no constructive notice, which reserves title to the consignor, *which nevertheless and contrary to its terms permits the consignee to make sales and deposit the proceeds of sale to his general bank account and use them for his own purposes is equally fraudulent as against the trustee.* * * * Prior to the so-called agreement it is admitted that the bankrupt and defendants dealt with each other as vendor and vendee. After the agreement, the bankrupt admits that he fixed the price of the shoes sold; he testifies that he sold them at any price he wanted to, altho the paper agreement provided that he was not to sell for less than the price fixed by defendants. When he sent the defendants any money, he did not accompany it with any statement of goods that he had sold, but paid him so much on account. *It was his habit to take the daily receipts of all sales made at his store and deposit them in his bank account, which contained the moneys realized from his general sales of defendants' stock and everybody else's stock.* The bankrupt's testimony that the cartons received had been marked either by himself or the defendant is contradicted flatly by a dealer who is selling him goods and carefully examined the boxes and testified that there were no initials on the front of any of the cartons in any part of the store.

"If it be said that what was done was contrary to the agreement, the answer is that the defendants by their conduct permitted the agreement to be ignored. * * * *Under the circumstances, we do not think that defendants*

are in a position to invoke the written agreement as against the trustee."

See also:

In Matter of High Grade Electric Store, 3 Amer. Bkpt. Reports, N. S. 78;

In re Shiffert (D. C. Pa.), 281 Fed. 284;

Flanders Motor Co. v. Reed, 220 Fed. 642, 644;

In re Penny & Anderson, 176 Fed. 141;

Adriance v. Rutherford Mill Co., 23 N. W. 718;

In re Wells, 140 Fed. 752 (D. C. Pa.);

In re Carpenter (D. C. N. Y.), 125 Fed. 831, 834;

Schultz, Trustee, v. Wesco Oil Co., 149 Wash. 21, 26, 27, 28; 270 Pac. 130; 63 A. L. R. 351.

By way of illustration, as to the discount companies who have paid out money on these accounts (Tr. 79 *et seqq.,* Edris; Tr. 82 *et seqq.,* Bailey) the petitioners have no firm position for they have permitted this to be done with full knowledge and, as between the two, under the well-known principle of law that when one of two persons must suffer by the fault of a third, the loss shall fall upon him who has enabled such person to do the wrong, the claimant must suffer the loss.

Bonnivier v. Cole, 90 Wash. 526, 530.

As to the trustee in bankruptcy, who occupies the position of a creditor holding a lien, claimant's position must necessarily be weakened. The testimony is clear that each petitioner had knowledge of the pledging of accounts. (Tr. 16, 27, 31, 32, 62.)

(g) Regular reports of sales were not made by dealer to manufacturer. (Tr. 14, 19.) See cases under "E" *supra* concerning the necessity for regular reports.

(h) Notes were accepted by Irwin & Company in payment for merchandise shipped under consignment, and are still retained. (Tr. 14, 15.)

III.

THE "CONSIGNMENT CONTRACTS" WERE DEVICES TO CONCEAL A SALE AND WERE IN FRAUD OF CREDITORS.

(a) Petitioners knew that Renfro-Wadenstein was insolvent at the time of the execution of the so-called consignment contracts.

Dealer was indebted heavily to each petitioner; notes and renewal notes had been delivered to petitioners and many notes had been protested. (Tr. 12, 26, 27, 41, 44, 45.) Rothschild's entire account of approximately $17,000.00 was covered by notes. (Tr. 19.) Irwin admittedly was anxious about the account and refused to ship further merchandise. (Tr. 19, 39, 40.) Rothschild also refused to fill pending orders until the old account was cleaned up. (Tr. 4, 19, 39.) Of the $20,000.00 indebtedness to Irwin's firm, $12,000.00 was for merchandise shipped *prior to 1927*. (Tr. 3.) Irwin and Rothschild conferred twice. Rothschild made a special trip to Seattle. He was here four days. After his investigations here, he decided to bring up the matter of

consignment. (Tr. 4, 18, 19, 23.) And although at that time Ketcham & Rothschild sold to 300 retail furniture stores throughout the United States, this was Rothschild's first experience with a consignment and Rothschild admitted that he would have preferred the routine open account. (Tr. 24.) Rothschild admitted that he and Irwin thought the dealer had insufficient working capital. (Tr. 23.) It will not do for petitioners to claim reliance upon financial statements submitted to them by Renfro-Wadenstein when they knew the status of their own accounts with dealer-deferred payments, renewed notes and reiterated requests for extensions in payment—and when Rothschild, after a special trip to Seattle, made full investigation as to Renfro-Wadenstein's condition. Sagacious men, such as Irwin and Rothschild, are not prone to accept self-serving statements of a retail concern under circumstances as related above. As to the practice of dealer and the knowledge of petitioners concerning dealer's condition see Tr. 12, 13, 25, 26, 27, 45, also Exhibit 46, trustee's Exhibits 'E," "F," "I," "J."

Insolvency.

Renfro-Wadenstein had throughout its history of four or five years pursued a practice of paying its bills with furniture manufacturers by notes and of renewing those notes. (Tr. 40.)

"There was no question at all that we were operating with too little capital. * * * As far as paying all of our bills in the course of our business, I don't think there was a time in the history of our business that we could

have done that. There was not a time in the history when we could pay all our bills and stay in business." Wadenstein, Tr. 46; see also Tr. 47.

It is significant that within a few months after the execution of the "consignment" agreements, Renfro-Wadenstein contemplated an assignment for the benefit of creditors, even despite their optimism and enthusiasm over their new location. (Tr. 55, 73, 74, 77.) The over-expanded and under-capitalized condition of their concern had reached the point where it was necessary to make a general assignment, later followed by bankruptcy with enormous liabilities and only sufficient assets to pay relatively small dividends. Balance sheets were introduced by petitioners purporting to show a net equity of $100,000.00 as of April 1, 1928; these balance sheets, Exhibit 54, were received in evidence upon the condition stated by the referee: "It will have to be supported by the trial balances and the authenticity of the trial balances from the books; otherwise, it would not be considered." (Tr. 63, 64.) These conditions were not complied with; the bookkeeper who made up the trial balances was not present to testify and Wadenstein admitted that he had never checked the trial balances prepared by Racine & Company with the books. (Tr. 63.)

It is apparent, however, that Renfro-Wadenstein was not able to pay its debts in due course of business, and was therefore insolvent so far as creditors were concerned. This is the undoubted test in the State of Washington.

Nixon v. Hendy Machine Works, 51 Wash. 419; 99 Pac. 11.

Simpson v. Western Hardware & Metal Co., 97 Wash. 626; 167 Pac. 113.

Ronald v. Schoenfeld, 94 Wash. 238; 162 Pac. 33.

McKay v. Sperry Flour Co., 95 Wash. 209; 163 Pac. 377.

Jones v. Hoquiam Lumber & Shingle Co., 98 Wash. 172; 167 Pac. 117.

McKnight v. Shadbolt, 98 Wash. 665; 168 Pac. 473.

Climenson v. Carson, 284 Fed. 507.

Wilson v. City Bank of St. Paul, 84 U. S. 473.

Pirie v. Chicago Title & Trust Co., 182 U. S. 438; 45 Law Ed. 1171.

Brooks v. Parsons Co., 124 Wash. 300, 302, 303; 214 Pac. 6.

It is well settled that the trustee may avail himself of the benefits given to existing creditors of the bankrupt *under state law* in order to avoid any transfer to one not a bona fide holder for value, the transfer having been made at the time of bankrupt's insolvency.

Stellwagen v. Clum, 62 Law Ed. 507; 245 U. S. 605.

Davis v. Willey (C. C. A. 9th), 273 Fed. 397.

In the latter case it is said in effect that the trustee is subrogated to the rights of the creditors and may therefore take advantage of such remedies as are open to a creditor. Therefore, the test of insolvency under the

state law may be applied to determine whether a particular transfer was or was not fraudulent as to the creditors. This being so as to fraudulent transfers, the same test should be applied when measuring the good faith of the petitioners in entering into the "consignment" contract with dealer.

Intent to Extend Credit.

Not only was dealer insolvent within the knowledge of petitioners at the time the consignment contracts were entered into, but it is also apparent from Irwin's and Rothschild's testimony that the dominant idea in their minds was the extension of *further credit.* On page 6 of Irwin's deposition (Exhibit 55) he testifies:

"A. We both had confidence in Renfro-Wadenstein and were anxious to work out a plan whereby we might be justified in extending to them a sufficient credit in order to enable them to handle our goods in quantities."

Irwin testified to the same effect repeatedly. (Pp. 63, 75, 82.)

If these statements as to the extension of credit were infrequent and casual in the deposition, one might not attach particular importance to them. Where, however, a capable business man such as Irwin testifies repeatedly that the dominant idea with him was the extension of credit to Renfro-Wadenstein and that the principal object in a new arrangement was to relieve Renfro-Wadenstein of immediate payment and to extend the time for payment, we submit that such testimony is vital in de-

termining the purpose of these arrangements. Rothschild and Irwin had consulted over this matter and had come to a common agreement. Irwin had authorized Rothschild to act for his company, subject to Irwin's final approval. (Tr. 4.) They had made the same analysis of the situation and had come to the same conclusion. The ultimate motive in their minds was to extend *credit* to the bankrupt without impairing their own position.

Those availing themselves of the benefits of consignment should conform strictly in their contract and in their operations thereunder to the requirements of consignment. The intent of the parties, the surrounding circumstances, the knowledge of petitioners as to dealer's financial condition and the operations of the parties under the contract, all indicate *mala fides* in connection with these contracts.

IV.

THE IRWIN CONTRACT, EVEN IF A CONSIGNMENT, IS NOT BASIS FOR RECLAMATION.

The Irwin contract was not complete until September 5, 1928. (Tr. 4 to 10, incl.) The order adjudicating dealer a bankrupt was entered November 9, 1928. In Irwin's case there was no acceptance of the contract by manual delivery. Rothschild was not authorized to complete negotiations with the dealer on behalf of Irwin & Company without the latter's final approval. (Tr. 4.)

The Irwin contract was mailed to Irwin & Company and was received about March 27, 1928 (Tr. 4), and was signed on that date by Irwin & Company, but Irwin did not accept the contract until September 5, 1928. (Tr. 4, 5, 10.) In fact, Irwin twice wrote dealer, indicating that until the bill of sale was satisfactory to him, he would not mail a copy of the consignment contract to Renfro-Wadenstein. (Letter dated May 4, 1928, Exh. 38; letter dated June 4, 1928, Exh. 43.)

Irwin refused to accept this consignment contract as framed. Paragraph IX thereof recited in effect that dealer had in its possession certain goods theretofore sold and delivered to it on credit and not paid for,

"and it is hereby agreed that the title to said goods and the same is hereby transferred and conveyed back to said party of the first part (manufacturer) and that from and after this date the same shall be treated as having been delivered to said party of the second part on consignment and under and subject to all the terms and conditions of this contract. In consideration of the transfer and conveyance of the title to said goods back to said party of the first part, that company does hereby cancel the indebtedness of said party of the second part for said goods."

Had this been the final agreement in the Irwin contract, as it was in the Rothschild contract, all that was needed was a ministerial act of listing the merchandise on the dealer's floor to determine the exact invoice value. Irwin, however, wrote dealer on May 4, suggesting that dealer *retain title* to all Phoenix merchandise and "as

much of the Royal as will leave the balance the amount of our account less the cash payments which it was arranged with Mr. Rothschild that he will make. * * * Please have the bill of sale corrected in this manner and return it to us *and we will forward the consignment arrangement as arranged for with Mr. Rothschild.*" (Tr. 6, 7, 38. See also Tr. 8, 9, 10 and Exh. 43.)

In other words, Irwin was saying in effect: "We do not want back all the furniture as provided in the contract; we insist on a modification of paragraph IX whereby we take back only so much furniture as we have specified in our correspondence; until you are willing to accept these terms we shall withhold the consignment contracts."

This amounted to a *modification* of paragraph IX of the "consignment contract" *excluding certain of the furniture on hand from the terms thereof.* It was not until September 5, 1928, that Irwin was willing to write an acceptance. (Exhibit 51.)

"An acceptance must be positive and unambiguous," Williston *"Contracts,"* Vol. 1, Sec. 72, p. 127, and cases there cited. It is equally elementary that if any provision is added or change made in the offer of one party, the offer is rejected unless and until the offeror accedes to the change or addition. Williston *"Contracts,"* Vol. 1, p. 128, Sec. 73.

"A conditional acceptance is in effect a statement that the offeree is willing to enter into a bargain differing in some respect from that proposed in the original offer."

Williston "Contracts," Vol. 1, Sec. 77, pp. 134, 135.

True, Irwin testified that the parties had from April 1 been operating under the consignment arrangement. However, it is the legal effect of what the parties did, not Irwin's self-serving interpretation thereof, which concerns us. Nor is Irwin, under the circumstances of this case, in position to ask a court of equity to take his own interpretation of dealings which are so patently doubtful in character.

The "consignment contracts" are prospective in their operations, not retrospective. They cover furniture *to be shipped.* Irwin shipped no furniture after September 5, 1928, therefore the Irwin contract creates no right of reclamation.

Assuming, without granting, that the contract is retroactive, it was executed within four months of the date on which dealer was adjudicated bankrupt, namely November, 9, 1928.

Whereas in Ketcham & Rothschild's instance the sale back to manufacturer contemplated a transfer of *all* furniture of manufacturer's make, *then on the floor of the dealer,* which furniture had been approximated by a personal investigation of Rothschild in the stock records of the dealer, the final agreement with Irwin did not constitute such a complete transfer. (Tr. 20, 21.)

Furthermore, in Irwin's case dealer had on his floor more goods in value than the amount which it owed Irwin

& Co. (Tr. 6), whereas in Rothschild's case dealer owed Ketcham & Rothschild more than the invoice value of Rothschild furniture on dealer's floor. (Tr. 20, 21.) This fact was apparent from the approximation made from the stock cards and was known to Rothschild when the consignment agreement was signed. Rothschild accordingly accepted *all* of the furniture of its make on dealer's floor, taking notes from dealer for the balance above value owing on the account. Irwin refused to accept all the merchandise on dealer's floor for the reason that it exceeded in value the amount owing from dealer to Irwin & Co. Thus it is apparent that the intent of the parties to the Rothschild contract on March 23, when the signed contract was delivered to Rothschild, was that all the furniture on dealer's floor had been conveyed back to Rothschild. Such was never the contract in the Irwin case and the completion of the final terms was delayed until September 5th.

INTEREST AND COSTS.

The District Court awarded interest at the rate of three per cent per annum from April 12, 1929, to May 1, 1931. (Tr. 240, 241.) There was no stipulation between the parties that the money should be placed on deposit or that the trustee should be accountable for interest thereon, the stipulation providing simply that certain sums should be held aside *in lieu of the merchandise.* (Tr. 184.) Obviously, had the merchandise itself been held pending the action, there would have been no

appreciation in value. In the absence of stipulation making the trustee liable for interest we respectfully submit that no interest should have been allowed.

The trustee asks for his costs as contained in cost bill, Tr. 245, 246.

PETITIONERS' AUTHORITIES.

It would unduly lengthen this brief to distinguish the authorities cited by petitioners. We find no case which sustains a contract vesting in the consignor the broad rights and imposing upon the consignee the onerous obligations created and imposed by these contracts, except as contracts of sale. Particularly is this true where the operations under the contracts manifest the intent of the parties to create relationship of creditor and debtor instead of consignor and consignee. It is significant that the memorandum decision of the referee in bankruptcy and the decision of the District Court make no reference to decisions from this state on the consignment feature except as the referee's decision distinguishes certain cases. The fact is that the contracts under consideration are a departure in the practical obligations created thereunder from consignment contracts heretofore considered by the courts. Without further elaboration, we confidently assert that petitioners have cited no case on all fours with the instant case.

CONCLUSION.

There is admittedly considerable confusion in the law of consignment contracts. Some courts have held one

provision indicative of sale; other courts have said the same provision is indicative of a consignment. It is certain, however, that the entire contract must be considered in the light of the rights created and obligations imposed. If there is doubt as to the contract itself, then the operations thereunder are of vital importance as are also the circumstances surrounding the execution of the contract. Giving petitioners the benefit of all doubt, the language of *In re Wells,* 140 Fed. 752, 754, is appropriate:

"While, then, in some aspects the case may be a close one, it is to be remembered that *the burden is on the claimant,* and under all the circumstances does not seem to have been met."

The contracts are essentially sales, not consignments. Petitioners drafted the contracts. The opportunity was theirs to make the contract free from doubt. Considering the surrounding circumstances—the large indebtedness of Renfro-Wadenstein to petitioners, which could not be met, the serious financial condition of Renfro-Wadenstein and its inability during the entire course of its operations to pay its debts in due course of business, the knowledge of petitioners of Renfro-Wadenstein's serious plight, and of the long established practice in assigning accounts receivable—there was every reason for petitioners, if they were sincere, to draft these contracts in conformity with recognized consignment contracts. Instead, they consigned "provisionally"; imposed upon dealer all freight and carriage charges and all expenses in dealing with the merchandise; placed themselves in a position to compel

payment on demand; prevented dealer from returning the goods and securing credit therefor; vested the title to accounts receivable in dealer; and failed to reserve to themselves the right of recall of the merchandise during the term of the contract. These conditions compel the conclusion that the contracts partake of the nature of sales, not of consignments.

But if petitioners had created consignment contracts, they never acted on the contracts as such. Bills of lading, invoices, interest rate, dominion of dealer over the merchandise and accounts receivable and proceeds, all remained the same as under the "frozen credit" arrangement. Reports of sales were not made regularly, dealer fixed the retail price, intermingled the furniture with other furniture on his floor, sold the merchandise on a common bill with other furniture and on conditional sale contract if it chose. By advertising and otherwise, the public was led to believe that the merchandise was dealer's. Notes were accepted by petitioners in payment for merchandise.

The burden is on claimants and their activities under the contract added to the burden rather than sustained it.

In addition, Renfro-Wadenstein was insolvent—never had been able to pay its debts in due course of business—and petitioners well knew the situation. Petitioners wanted payment for their merchandise and their dominant idea was to enforce payment by dealer. The contracts were merely devices for the enforcement of such payments.

Irwin's contract, at any rate, executed on September 5, 1928, after all furniture was shipped, is of no effect; and would be a preference if it pertained to any furniture shipped.

Looking to the benefits accruing to petitioners and the burdens borne by dealer, and to the circumstances before and at the time of the execution of the contracts, and considering the operations under the contracts, we submit that claimants have wholly failed to sustain the burden of showing these contracts to be consignments. In any event, Irwin's contract can have no validity against the trustee.

Respectfully submitted,

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